IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 131 of 1980
and
Civil Application No.7432 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SANGAR GAGU DHULA

Versus

SHAH LAXMIBEN TEJSHI

Appearance:
1. Second Appeal No. 131 of 1980
MR YS MANKAD for Appellant
NOTICE SERVED for Respondents No. 1,5/1
SERVED BY RPAD - (R) for Respondent No. 2
..... for Respondents No. 3-5/1
MR NV ANJARIA for Respondent No. 6

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 04/12/2001

ORAL JUDGEMENT

#. Sangar Gagu Dhula - appellant - original plaintiff No.1 has filed this second appeal under Section 100 of C.P.C. against the judgment and decree dated 29.11.1979 passed by the Assistant Judge, Kachchh - Bhuj in Regular Civil Appeal No.86 of 1978. The learned Judge by his impugned judgment and decree pleased to dismiss the appeal filed by the appellant - original plaintiff No.1 and also dismissed the cross objections filed by the original defendant No.1 in this behalf. The learned Judge has confirmed the judgment and decree dated 29.4.1978 passed by the learned Civil Judge (Junior Division), Mandvi - Kachchh in Regular Civil Suit No.20 of 1974 filed by the original plaintiff nos. 1 to 5 in this behalf.

#. The short facts giving rise to this appeal are as under :

#. There is a property being residential house with appurtenant land (suit property) situated in Sadan Falia of village Bidada, District Kutch. The original plaintiff Sangar Gagu Dhula, Power of Attorney Holder for Shah Jethalal Tejshi, Taluka Mandvi, as a mortgagor had mortgaged the suit property with defendant mortgagee for a period of 99 years. Consideration for the same was taken by the mortgagor in the sum of Rs. 11,000/(Rupees eleven thousand only). The mortgage Deed was executed on 15.12.1940. The mortgage Deed contained a condition that mortgagee can make any construction on the mortgaged property. Thus, the mortgage deed specifically contemplates that the consideration will be repayable by the mortgagor to the mortgagee on the expiry of 99 years from the date of the transaction (date of mortgage) and on consideration being repaid, the mortgagor was entitled to redeem the property. The original mortgagee expired in the year 1956. The present respondent-defendant No. 1 is in occupation of the suit property on behalf of original mortgagee as a usufructuary mortgagee.

3.1 However, before expiry of the stipulated period of 99 years, the plaintiff filed the present suit for redemption of mortgage contending that the condition of non-redemption for a period of 99 years was incorporated in the mortgage deed on account of the mortgagee taking disadvantage of the financial position of the original mortgagor-Tejshi Monshi. The aforesaid condition of non-redemption for a period of 99 years and the condition that the mortgagor can put up any type of construction in the suit property are oppressive and unconsonable and are

clog on equity of redemption. In the suit the redemption was sought before the expiry of the stipulated period on the specific averment and contention that the period of 99 years before which redemption could not be enforced was an oppressive term and would in law amount to a "clog on the equity of redemption".

#. It may also be stated in the suit that the plaintiff only sought the decree of the redemption of the property in question. If one reads the plaint as a whole which also contains specific averments that the plaintiff mortgagor has a right "to seek avoidance" of this oppressive term at any time, and therefore, on this clog being lifted, the plaintiff has right to obtain a decree of redemption. However, the frame of the suit and the nature of the pleadings as referred to above would make no difference inasmuch as the parties were ad idem on the nature of the controversy.

#. The original suit has been resisted by the defendants. It may be noted that defendant No. 1 is the heir and occupant on behalf of original mortgagee in possession. Thus defendant No. 1 is the heir of the original mortgagee in possession. Defendant No. 1 has got executed mortgage deed and thereafter she is liable to redeem the suit property. The suit was resisted by defendant No. 3. Defendant No. 3 has denied that the conditions were clog on the right of redemption of the suit property of mortgagor. It was also denied that the original mortgagee has taken disadvantage of the financial position of the mortgagor.

#. Before the trial court, issues were raised at Exh.42. The material issues which were raised before the trial court, read as under :

Issue No.1 :

"Whether plaintiffs prove that some of the conditions imposed in mortgagee contract are avoidable conditions ?"

Issue No.6 :

"What is the effect of Limitation Act upon this suit ?"

#. The learned trial Judge by his judgment and decree dated 29.4.1978 was pleased to hold that the conditions mentioned in the mortgage document constitute clog on

equity of redemption, and, therefore, they are voidable and illegal. The learned Trial Judge held that the original mortgage deed was executed on 15.12.1940 and as per Article 61 of the Limitation Act, 1963 the suit must be filed within a period of 30 years from the date of redemption of the suit property. In view of the same, the plaintiff ought to have filed the suit in the year 1968-69 and as the plaintiff has filed the suit in the year 1974, the suit is clearly time barred and deserves to be dismissed. As regards other issues, the trial Court did not give any finding, namely, issue Nos. 2, 3, 4, 6A and 6B.

#. Being aggrieved by and dissatisfied with the aforesaid judgment and decree of the trial Court, plaintiff No.1 had filed Civil Appeal No.86 of 1978 before the Assistant Judge, Kachchh at Bhuj.

8.1 The learned Assistant Judge, Kachchh at Bhuj, by his judgement and order dated 29.11.1979 has held that the mortgage deed was executed on 15.12.1940 and as per Article 61 of the Limitation Act, 1963 the suit ought to have been filed within a period of 30 years i.e. to say on or before 15.12.1970. The suit has been filed in the year 1974. Hence it is clearly barred by limitation.

#. Being aggrieved by and dissatisfied with the aforesaid judgment and decree of the appellate Judge, the original plaintiff No.1 has filed the present Second Appeal before this Court somewhere in 1980. When the appeal was preferred, the following substantial question of law was raised.

"Whether on the facts and circumstances of the case, the lower appellate court erred in holding that the suit was barred by law of limitation?"

##. Mr.Y.S.Mankad, learned advocate for the appellant, has pointed out that, originally, when the aforesaid matter reached for hearing before my learned brother Mr. Justice M.S.Shah, he has observed that as there was conflict of views amongst the Courts in the case of Soni Motiben Vs. Hiralal Lakhansinh, reported in 1981 GLR 473, this Court (Coram : S.B.Majmudar,J (as he then was) has taken a view that when a condition in a mortgage deed found to be a clog on the equity of redemption, it is a condition void ab initio. Such a view is also taken by the Madras and Punjab & Haryana High Courts. Contrary view held by this Court in the case of Rajgor Danji Mulji Vs. Somabhai reported in 1993(2) GLR 1243. In this

case, this Court (Coram: A.N.Divecha,J (as he then was)) has taken a contrary view that when such a condition is found to be a clog on the equity of redemption, it is not void ab initio but merely voidable at the instance of the suffering party - the mortgagor. In view of the same, my learned brother Mr. Justice M.S.Shah has referred the matter to the Full Bench raising the following three questions on 12.5.1999.

(1) Whether a condition in a mortgage deed which is found by the Court to be a clog on the equity of redemption is void ab initio or merely voidable at the instance of the suffering party i.e. mortgagor.

(2) When a mortgage deed stipulates a condition that the mortgage is irredeemable for a period of 99 years of any such long period, whether the starting point of the period of limitation prescribed by Articles 61(a) of the Limitation Act, 1963 for filing a suit for redemption would be the date of execution of the mortgage deed or the date of declaration by the Court that such a condition was a clog on the equity of redemption.

(3) Whether a suit for a declaration that any such condition is void or voidable (with or without a prayer for redemption of mortgage) filed after expiry of the period of 30 years from the date of execution of the mortgage deed would be time barred under Article 61(1) of the Limitation Act, 1963.

##. Mr.Mankad, learned advocate for the appellate, submitted that the aforesaid matter has been resolved by the Full Bench in the very case of the appellant. The said decision has been reported in 42(1) GLR 697 (Sangar Gagu Vs. Shah Laxiben. The Full Bench consisting of D.M.Dharmadhikari,CJ, Y.B.Bhatt & J.M.Panchal,JJ after referring the entire case law on the points in paragraph 37 (on page 709) the Full Bench (Per Y.B.Bhatt,J) has observed as under :

"In the light of the aforesaid discussion, I find that the contentions raised by learned counsel for the mortgagee are not well founded and cannot be sustained. In view of the aforesaid discussion I find and held that "the right to redeem or to recover possession" would accrue to the mortgagor within the meaning of section 61(a) of the Limitation Act only when the Court lifts

the clog on the equity of redemption. Consequently, limitation would begin to run only from that day, and therefore necessarily such a suit could not be said to be barred by limitation (provided the suit prays both for lifting the clog against the equity of redemption and also prays for a decree of redemption of the mortgage)".

11.1 Thereafter, the Honourable Chief Justice has given concurring judgment and in paragraph 45 on page 711 the Full Bench, after referring certain aspects of the matter, fully answered all the three questions thus:

"Para 45 - For the reasons aforesaid, I fully agree with the conclusion reached by my learned brother Y.B. Bhatt, J and answer the questions posed by the learned single Judge as under:

Answer to Question No.1 :

The condition in a mortgage deed which is found to be clog on the equity of redemption is ab initio void or invalid but it is not so in absolute sense, meaning that it would become so only upon the mortgagor resorting to remedy in a Court of law and on the Court, in the facts and circumstances of the case, coming to the conclusion that the condition in the mortgage deed is clog on the equity of redemption.

Answer to Question No.2 :

Where a condition in the mortgage deed is a clog on the equity of redemption, period of limitation under Art. 61(a) for filing suit of redemption can never commence from the date of execution of the mortgage deed but would commence from the date the Court holds that period of redemption fixed in the mortgage deed of unreasonably long period of time is a clog on the equity of redemption. Period of limitation would, therefore, commence from the date of declaration of such condition as a clog by the Court.

Answer to Question No.3 :

As discussed above, where a mortgagor files a suit for grant of relief of declaration of the

condition in the mortgage deed as a clog on the equity of redemption with consequential relief of granting redemption of the mortgaged property, such a suit cannot be barred under Art. 61(a) of the Limitation Act, because the right of redemption and to recover possession would accrue only when clog on the equity of redemption is lifted by the Court by declaring the condition in the mortgage deed as invalid or void and the prescribed period of limitation of 30 years would commence only from the decision or decree of the Court."

##. In view of the aforesaid decision of this Court, the learned advocate for the appellant submitted that as the issue of limitation which was decided against the plaintiff by both the lower courts, has been held in favour of plaintiff No.1 by the Full Bench and as all other issues have not been decided by the trial court and the appellate court, the matter must be remanded to the trial court.

##. The learned advocate for the appellant also submitted that, out of abundant caution, the appellant has also filed Civil Application No.7432 of 2001 and in paragraph, the appellant made a prayer for amending the prayer clause by adding paragraph 12 in the plaint which reads as under :

"that it may be declared that the condition about 99 years Bandhi along with the condition that the mortgagor can build any building thereon is a clog in redemption of the mortgage and the same condition be avoided and the decree for redemption be passed."

##. The learned advocate for the appellant, therefore, submitted that, in view of the finding of the trial Court, appellate court and in view of the finding of the Full Bench, as the trial court has not decided any other issues, this Court may remand the matter before the trial court. According to him, the trial court has raised the issue nos. 2, 3, 4 6A and 6B which were not answered by the trial court and there is no finding of the appellate court also in this behalf.

##. The learned counsel for the appellant has also relied upon the paragraph nos.4, 4.1 (on page 699), 43 and 44 (on page 710, 711) of the Full Bench's judgment and also relied upon the finding of the trial court and the appellate court.

##. The learned counsel for the appellant has submitted that if we read the plaint as a whole along with the prayer clause, the said prayer is already there. He submitted that, in view of the observations made by the Full Bench in this behalf, it is not open for the respondent to contend that the prayer cannot be granted at this stage.

##. Mr.Anjaria, learned advocate for the respondent submitted that, in view of the finding of the Full Bench and in view of the fact that the plaintiff has raised only one prayer and subsequently tried to amend the prayer, and in that facts and circumstances of the case, this Court must decide the matter at this stage and may not remand the matter before the trial court. The learned advocate for the respondent has referred to the judgment of the Full Bench, more particularly paragraph nos.37, 44 and 45 of the Full Bench's judgment.

##. The learned advocate for the respondent, has also raised the contention that the prayer which has been raised by the plaintiff in Civil Application No.7432 of 2001 is absolutely new prayer and the same cannot be granted and even if it is granted, the same is barred by limitation because the suit is of 1974. The said prayer is not the original according to him.

##. In my view, contention raised by the learned advocate for the appellant has considerable force from the record of the case. The Full Bench's judgment is binding on me, and therefore, it will not be proper for me to deal with the said contention at this stage. According to me, the said prayer is the consequential prayer and it ought to have been granted at this stage. I have gone through the pleadings, finding of the trial court as well as the finding of the appellate court and also the finding of the Full Bench which arose out of this very matter, and therefore, it is an admitted fact that the learned trial judge has not decided any other issues in this behalf which has been confirmed by the appellate court. In fact, substantial question of law which has been raised by the plaintiff is only qua the limitation and no other question of law has been referred by the appellant in this behalf.

##. In my view, therefore, the matter is required to be remanded to the trial court for fresh deciding the matter on the record of the case as it is and the trial court will consider the pleadings, oral and documentary evidences and will try to give finding, particularly, on

the issue nos.2, 3, 4 6A and 6B which have not been answered by the trial court earlier. The trial court will take into consideration the judgment of the Full Bench reported in 42(1) GLR 697 as well as the judgment of this court in this behalf. As in this case, the suit is of 1974, I request the learned trial Judge to decide the matter as expeditiously possible preferably by 31/3/2002 in this behalf.

(K.M.Mehta,J)
(pathan/pkn)